No. 84-1601

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AETNA LIFE INSURANCE CO.,
Appellants,

versus

MARGARET W. LAVOIE AND ROGER J. LAVOIE, SR.,
Appellees.

Amicus Brief of Alabama Defense Lawyers Association in Support of Petitioner Aetna Life Insurance Co.

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I

STATEMENT OF INTEREST

This association has an interest in the administration of justice for the citizens and businesses in the State of Alabama. Counsel represents that, given the page limitations, appellant will not be adequately able to fully address all legal issues concerning whether Alabama Supreme Court Justice T. Eric Embry should have recused himself, and further, how that action impacted the entire court. More importantly, this association's participation in the briefing process will underscore that the issues presented for this Court go beyond a resolution in the case at bar, to address the due process of all litigants before the Alabama Supreme Court. That is, this association's participation is intended to demonstrate that the concern for fairness goes beyond the insurance company involved in this litigation, and the proceedings below need to be examined in light of these due process and fairness issues as they concern the administration of justice in the State of Alabama.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by Aetna in brief are adopted. This brief addresses only the disqualification issue. In that regard, the issue presented is not narrowly whether Justice Embry had a "pecuniary interest" in the outcome of the litigation, but more basically, whether due process concerns for the appearance of a fair trial mandated his recusal, and the Court's recusal.

ARGUMENT

A. THE HISTORICAL BASIS FOR CONCERNS WITH FAIRNESS AND THE APPEARANCE OF FAIRNESS IN OUR JUDICIAL SYSTEM: DUE PROCESS

> [A]n appearance of evil is often worse than the evil itself, and others get the notion that we do not administer justice in our court system.[1]

The judiciary's concern for moral rectitude is not unique. Society has long been concerned with the issue of integrity. *Proverbs* 20:7. Indeed, Aristotle viewed law itself as an outgrowth of a moral ideal. H. Cairnes, *Legal Philosophy from Plato to Hegel* 107 (1949). Other students of jurisprudence such as St. Thomas Aquinas attributed a theological foundation to law, *Id.* at 167; hence our preoccupation with cardinal virtues in judicial ethics.

In fact, one of the earliest and most significant opinions issued by this Court, *Marbury vs. Madison*, 1 Cranch 137 (1803), illustrated why respect for the judiciary is so crucial. As noted by Hamilton in *The Federalist* No. 78:

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of

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1 *Potashnick vs. Port City Const. Co.*, 609 F.2d 1101, n. 8 (5th Cir.), *cert. denied* 449 U.S. 820 (1980). [Hereinafter *Potashnick*].

> the strength or of the wealth of the society: and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgments: and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power...

Justice Frankfurter, dissenting in *Baker vs. Carr*, 369 U.S. 186, 267 (1962) agreed, noting that the court possesses "neither the purse nor the sword".

Early English common law practice required disqualification solely for financial interest. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 611-12 (1947). American courts, however, expanded this narrow view. *Id.* at 612. Consequently, today disqualification may be necessary even though there is no bias in fact. *Hall vs. Small Business Admin.*, 695 F.2d 175, 179 (5th Cir. 1983); *Limeco, Inc. vs. Division of Lime*, 571 F.Supp 710, 711 (N.D. Miss. 1983); *Bolden vs. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), *rev'd on other grounds*, 267 Ark. 504, 593 S.W.2d 156 (1980) (commending judge for voluntary recusal, whether he actually sheltered any bias or not, to dispell any suspicion that litigants might not be receiving an impartial trial); and *State vs. Deutsch*, 34 N.J. 190, 168 A.2d 12 (1961).

The so-called "duty to sit" rule has been replaced with, in the federal system, codified rules preferring error on the

side of caution and disqualification. *Potashnick*, *supra*, at 1112.

In short, public confidence in the impartiality and reasoned foundation of judicial decisions is the basis of the authority of the judiciary. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 764 (1973). Public trust in our court system is doubtless or should be of preeminent concern. *See*, *e.g.*, H. James, *Crisis in the Courts* (1967) and H. Jacob, *Justice in America* (1972).

Based on the foregoing, it is no surprise that the Court has "always endeavoured to prevent even the probability of unfairness," *Withrow vs. Larkin*, 421 U.S. 35, 47 (1975) (*quoting In re Murchison*, 349 U.S. 133, 136 (1955), and the Court has further made "a fair trial and a fair tribunal" a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). *See also*, *Ward vs. Monroeville*, 409 U.S. 57 (1972), *Tumey vs Ohio*, 273 U.S. 510 (1927). Alabama follows, which will be discussed more thoroughly. *Ex parte White*, 53 Ala. App. 377, 300 So.2d 420, *cert. denied* 293 Ala. 778, 300 So.2d 439 (1974) (quoting Sir Thomas Moore: "If the parties will at my hand call for justice, then were it my father on one side, and the devil on the other, his cause being good, the devil should have right").

A litigant, consequently, is entitled to be heard by a judge who is "wholly disinterested" in the matter before him. *Withrow vs. Larkin*, 421 U.S. 35, 46-47 (1975). This entitlement, founded in due process, is the foundation upon which our judicial system rests. *See*, *In re Murchison*, 349 U.S. 133, 136 (1955).

B. THE EXPERIENCE OF FEDERAL AND STATE COURTS ON THE ISSUE OF INSURING THE APPEARANCE OF EXEMPLARY JUDICIAL ACTIVITY

> Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct.[2]

The Canons of Judicial Ethics implore judges to avoid the appearance of impropriety as well as impropriety itself. The appearance of fairness has long been a concern of this Court. *See, e.g., Berger vs. United States*, 255 U.S. 22 (1921). By legislation for federal courts, Canon 3C of the Code of Judicial Conduct, *reprinted in* 69 F.R.D. 273 (1975) has been converted into law, 28 U.S.C. §455. *Hall, supra*, at 178. *See*, H. R. Rep. No. 93-1453, 93d Cong., 2d Sess. (1974). Alabama, likewise, adopted the Canons of Judicial Ethics as having the force of law. *Matter of Sheffield*, 465 So.2d 350, 355 (Ala. 1984) ("The canons are not merely guidelines for proper judicial conduct."); *Wallace vs. Wallace*, 352 So.2d. 1376, 1378n. 1 (Ala.Civ.App. 1977). The Canons, as interpreted by courts in the federal system, require recusal if impartiality "might reasonably be questioned." *Hall, supra*, at 178; *Potashnick, supra*, at 1111. The state courts, have, similarly, overwhelmingly required recusal where impartiality "might" be questioned. *See, e.g., Bolden vs. State*, 262 Ark. 718, 561 S.W.2d 281 (1978), *rev'd on other grounds*, 267 Ark. 504, 593 S.W.2d 156 (1980); *Rudolph vs. Gorman*, 169 Cal. App.2d 66, 338 P.2d 218 (1959); *People vs. District Court in and for Third Jud. Dist.*, 192 Colo. 503, 560 P.2d 828 (1977) ("Caesar demanded that

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2 *Hall vs Small Business Admin.*, 695 F.2d 175, 176, (5th Cir. 1983) [Hereinafter *Hall*].

his wife shall not only be virtuous, but beyond suspicion; and the tate should not be any less exacting with its judicial officers...") (560 P.2d at 832 n. 1, *quoting State ex rel. Barnard vs. Board of Education*, 19 Wash. 8, 52 P. 317, 321 (1898)); *In re Hupp's Estate*, 178 Kan. 672, 291 P.2d 428 (1955); *Sadberry vs. Wilson*, 441 P.2d 381 (Okla. 1968); *Municipal Publications, Inc. vs. Court of Common Pleas of Philadelphia County*, ___ Pa. ___, 489 A.2d 1286 (1985); *People vs. Esposito*, 199 N.Y.S.2d 368 (1960); *Chicago, Milwaukee, St. Paul and Pacific R.R. Co. vs. Washington State Human Rights Com'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976).

As noted in virtually all cases just cited, the *appearance* of impartiality is the goal of Canon 3C. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 745 n. 33 (1973). Justice Frankfurter, in a rare expression by a sitting Justice recognizing his own bias, and explaining his recusal in the Washington bus loudspeaker case, noted:

> The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact... . My feelings are so strongly engaged... that I had better not participate in judicial judgment upon it.

Public Utilities Com'n vs. Pollak, 343 U.S. 451, 467 (1952) (Frankfurter, J.). Actual virtue, therefore, is not the determining factor. *Hall, supra*, at 179. *See also, Sadberry vs. Wilson*, 441 P.2d 381, 384 (Okla. 1968) (notwithstanding that the judge "may sincerely feel that he can act impartially".); *Chicago, Milwaukee, St. Paul and Pacific R.R. Co. vs. Washington State Human Rights Com'n*, 87 Wash.2d 802, 557 P.2d 307, 312 (1976) (The appearance of fairness

requires recusal "even if that interest [accused] did not actually affect him"). Recusal also may be required even though the alleged basis for an impermissible interest "may be known to the judge and all mankind to be false." *People vs. District Court in and for Third Jud. Dist.*, 192 Colo. 503, 560 P.2d 828, 832 (1977) *quoting People ex rel. Burke vs. District Court*, 60 Colo. 1, 8-9, 152 P. 149, 152 (1915).

The importance of the foregoing authorities is that, if it reasonably appears to the public that a judge should not sit in judgment over principles which would apply to his own case, then recusal is mandated, It is important to recognize that this is not a personal attack upon the judge, or the court, but rather the judiciary's concern that the appearance of impartiality be preserved to maintain public confidence.

C. THE ALABAMA EXPERIENCE

> We do not take this subject of disqualification lightly. It is a matter of great importance affecting the orderly processes of our judiciary. A grave responsibility has been handed to us, and we are mindful of its implications. At the same time, we are aware of our obligation in preserving judicial impartiality. Every principle of law and canon of judicial conduct in our system of jurisprudence mandates the cold and stern neutrality of an impartial judge. Anything less is a travesty.[3]

As early as 1878, in *Gill vs. State*, 61 Ala. 169 (1878) the Alabama Supreme Court recognized the significance of

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3 *Ex parte White*, 53 Ala. App. 377, 300 So.2d 420, 434, *cert, denied*, 293 Ala. 778, 300 So.2d 439 (1974).

disinterested judicial officers:

> According to the stern morality of the common law, a judge is required to be legally indifferent between the parties. Any, the sightest pecuniary interest in the result, disqualifies.

Id. at 172. In another early opinion, the Court recognized:

> Any interest, the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to the suit, is sufficient to disqualify.

Ex parte Cornwell, 144 Ala. 497, 39 So. 354, 354 (1905).

In 1967, when a fellow justice was a plaintiff in his own personal injury suit arising out of the justice's untimely collision with a utility pole, and when the litigation ended up in Montgomery, the entire Court recused itself. *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967). Current Alabama Supreme Court Justice Maddox, concurring specially as to the ruling on Aetna's Motion for Disqualification in this case, also explained that in *Duncan vs. Johnson*, 338 So.2d 1243 (Ala. 1976), "I recused myself because a justice had represented one of the parties to the litigation." *Aetna Life & Casualty vs. Lavoie*, ___ So.2d ___, 19 Ala. Bar Rptr. 1147, 1153 n. 1 (March 8, 1985). A footnote to the *Duncan vs. Johnson* opinion reveals that the entire panel of Alabama Supreme Court Justices recused themselves. Alabama, also, has been concerned with the appearance of impropriety. *Matter of Sheffield*, 465 So.2d 350, 356-357 (Ala. 1984); *Acromag-Viking vs. Blalock*, 420 So.2d 60, 61-62 (Ala. 1982); *Wallace vs. Wallace*, 352 So.2d 1376, 1379-1380 (Ala. Civ. App. 1977); and *Ex parte White*,

53 Ala. App. 377, 300 So.2d 420, 428-434, *cert. denied*, 293 Ala. 778, 300 So.2d 439 (1974).

Consequently, members of the current Alabama Supreme Court have addressed circumstances when the "totality of facts" create a "reasonable question of impartiality", and the corresponding duty to avoid the appearance of impropriety by resolving all doubts in favor of recusal. *Matter of Sheffield*, *supra* (opinion authored by Justice Jones, with Justices Maddox, Faulkner, Almon, Shores and Adams concurring. Justice Beatty and Chief Justice Tobert concurred in the result, and Justice Embry was "not sitting."); *Acromag-Viking vs. Blalock*, *supra*, (opinion by Justice Maddox with Justices Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams concurring, as well as Chief Justice Torbert). The Alabama Court of Civil Appeals, addressing a case involving whether the trial judge presiding over our Governor's divorce proceedings was a little too close to the governor, observed:

> The reasonable question is raised in the mind of the public who must believe in the total integrity and impartiality of their judges. We believe the purpose and function of the Canons of Judicial Ethics is to support the belief and confidence of the people in their courts.

Wallace vs. Wallace, 352 So.2d 1376, 1379 (Ala. Civ. App. 1977).

D. THE CHALLENGED JUDGE SHOULD NOT JUDGE HIMSELF

> To perform its high function in the best way "justice" must satisfy the appearance of justice.[4]

The challeged judge should not judge himself. Recall Justice Frankfurter's comment in the loudspeaker case, quoted herein, as well as *State vs. George*, 250 Ark. 968, 470 S.W.2d 593, 596 (1971); and *Municipal Publications, Inc. vs. Court of Common Pleas of Philadelphia County*, ____ Pa. ____, 489 A.2d 1286, 1289 (1985) ("Where the disqualification hearing brings in question the credibility of the judge, it is obvious that the judge is not in the position to maintain the objective posture required to preside over the preceding and to assume the role of the trier of fact in that proceeding"). *See generally*, *Berger vs. United States*, 225 U.S. 22 (1921) and Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1437 n. 22 (1966). The foregoing authorities represent merely an extension of the time-honored saying about a lawyer who represents himself.

It is important to reiterate that personal umbrage need not be taken by the actions asserted by Aetna. Indeed, such umbrage would illustrate the problems of sitting in judgment over one's self, and totally misses the point of avoiding the appearance of impropriety. As noted in the cases cited, it is not the truth *vel non* of the charges that is important. It is the perception of the public and the overriding importance of confidence in the integrity of the judicial system which due process mandates.

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4 *Offutt vs. United States*, 348 U.S. 11, 14 (1954).

Ignoring any question of impermissible interest of Justice Embry, the simpler question is whether in the minds of the public the Justice's impartiality might reasonably be questioned. It is submitted that it would be impossible to conclude such an appearance could not exist. Suppose Justice X of the State Supreme Court was arrested, and a warrantless search of his locked briefcase revealed damaging evidence. Should that Justice be allowed to decide an unrelated case setting forth the standards for warrantless searches of locked briefcases? In response to the anticipated argument that no law is being molded here, one need only consider the checkered and evolving nature of Alabama's history concerning the development of the relatively new tort of bad faith, as set forth in Exhibit C on pages 59A-61A in the Petition of Writ of Certiorari, filed in a case substantially related to the one at bar, *Nationwide Mutual Insurance Co. vs. Clay*, S.Ct. No. 84-1942.

Moreover, a reading of the deposition of Justice Embry, set forth in its entirety in Exhibit 4 in the Appendix for Appellant in this case clearly reveals his predilections, not only in his bad faith suit (Appendix for Appellant, *Aetna vs. Lavoie*, 161a, 164a-170a, 173a-174a, 176a, 184a, 246a-247a) but also his feeling toward casualty companies in general. *Id.* at 166a ("They just goofed up like the casualty companies do, and other companies").

Suppose Judge Y's wife died in a car crash, resulting in the Judge's filing of a death suit against General Motors for faulty steering on a 1984 Riviera. Judge Y is subsequently assigned a suit by a plaintiff against General Motors, alleging the same or a similar defect on a 1984 Riviera. The uneasy feeling in the lower intestine of counsel for General Motors arises out of concern for impartiality, and this principle cuts both ways. There are doubtless numerous other examples which would create reasonable suspicion in the

minds of a public already highly distrustful of our legal system. This mandates avoiding the appearance of impropriety.

E. THE APPEARANCE OF IMPARTIALITY REQUIRES THE RECUSAL OF THE COURT

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.[5]

As noted in the preceding section, on two occasions since 1967, all members of the Alabama Supreme Court recused themselves because of the apparent involvement of one of their members in the questioned controversy. Counsel and those who have not presided with other judges do not know what influence chamber proceedings may have. There is no way to gauge the accuracy of accounts concerning chamber procedures, such as the controversial book by Bob Woodward on the Supreme Court proceedings. B. Woodward, *The Brethren* (1979). One would easily imagine, nonetheless, an exchange of ideas among the justices. At least, one would hope for such, even though the exchange may occasionally produce strongly differing viewpoints. One could also foresee respect for certain members, and a healthy critical view of others. It is not often there will be a record of the comments or ideas of the judge or justice sought to be disqualified such as there apparently was of Judge Landis in *Berger vs. United*

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5 Canon One - Code of Judicial Conduct, *reprinted* in 69 F.R.D. 274 (1975).

States, 255 U.S. 22 (1921).[6]

Notwithstanding this paucity of opinions, there is a line of cases in a sufficiently analogous field. Several cases have held that the relationship of a law clerk to a judge mandates recusal in instances where the clerk bears some relationship to the litigation before the judge. *Hall*, *supra*; *Fredonia Broadcasting Corp vs. RCA Corp.*, 569 F.2d 251 (5th Cir.), *cert. denied* 439 U.S. 859 (1978); *Miller Industries, Inc. vs. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980); *Simonson vs. General Motors Corp.*, 425 F. Supp. 574 (E.D. Pa. 1976); and *Reddy vs. Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976), *cert. denied* 439 U.S. 839 (1978).

Ostensibly, Brethren of a court would value the input of a fellow Justice no less than that of a law clerk. Implicit in the decisions requiring disqualification where a law clerk is associated is the concept that some subtle factor could sway the determination rendered by the judge. More importantly, and explicit in the decisions, is the concern for perceived fairness in the eyes of the public. Even though a law clerk might violently disagree with the decision reached by the judge, because of the perceived problem that the outcome "might be tainted," recusal has been mandated.

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6 Although note that the dissent of Justice Day, *id.* at 37, points out there was a substantial discrepancy between the alleged offending remarks submitted by affidavit, and the official transcript. Once again, this highlights that the important point is not whether the charges were true, but that unfairness was perceived.

In response to an anticipated argument that clerks are more clearly aligned with "their" judges, one would hope that such assistants to judges and justices serve as more than a mirror image, and that a free and fair difference of opinion occurs as often between a clerk and his judge as among judges.

All of this is admittedly in the realm of reasoned speculation, and again it is the concern for the appearance of fairness which should guide the Court to its conclusion. It would indeed be strange to expect a reasonable public to imagine that the involvement of a fellow justice would not rise to the same magnitude of a law clerk of the same justice.

As an example, there are unquestionably partners in law firms with personality conflicts. Regardless of the eagerness of partner A to encounter partner Z on the field of battle and claim victory, the public would perceive all partners to the firm as having loyaty to one another, and hence the prohibition against representing adversaries in one firm. In any event it would not be for partner A nor partner Z to determine whether to take the case, that decision would lie with the clients, assuming they would agree to such a conflict and assuming that the firm would place itself in such a precarious position. Are we to require less of our judiciary than we require of lawyers and clerks?

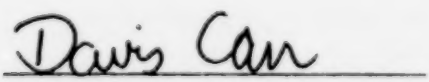
Only the members of the tribunal in question could testify whether the involvement of their fellow jurists had any impact on their respective decisions. Our system should not adopt a rule, however, which would suggest or require investigation into the decision-making process of an appellate tribunal. That is the reason the cases emphasize that the appearance of impartiality must be preserved, and there is a policy in favor of recusal, in such circumstances. The lofty and high-sounding comments quoted at the beginning

of each heading to this brief, and noted throughout the authorites cited in this brief, are either binding, or they are nothing. All of these forums have fully recognized the absolute requirement of unquestioned integrity in our judicial system. The point is not whether there is "guilt" or innocence. The point is avoiding even the hint that there may be guilt. These questions are faced in the age of a highly skeptical public, who are mindful of the old adage that the Devil looks after his own. This court is presented with the opportunity to adhere to the virtuous ideals uniformly mandated by all authorities on this topic, and by virtue of the historical precedent, or on the other hand distinguishing relevant case law to approve the proceedings below. The problem with the latter approach is that no matter how unintended, and no matter how pure the hearts of those involved, a feeling of suspicion for our system is one reason for the general lack of esteem of our courts, and its officers, the lawyers. This is why the case at bar affects more than the interests of the parties hereto, and why this Court should seize the opportunity to underscore the due process requirements of apparent fairness to litigants.

CONCLUSION

For the reasons advanced above, the judgement of the Alabama Supreme Court is due to be reversed and rendered.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of August served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed and first class postage prepaid.

Davis Carr

Davis Carr